STATE OF MICHIGAN

COURT OF APPEALS

KATHY PANCONE,

Plaintiff-Appellee,

v

MONROE CHARTER TOWNSHIP and CITIZENS INSURANCE COMPANY OF AMERICA,

Defendants-Appellants.

UNPUBLISHED

No. 189298
WCAC
LC No. 91-000531

Before: Cavanagh, P.J., and Gage and D.A. Burress*, JJ.

GAGE, J. (dissenting):

I respectfully dissent. A plaintiff who voluntarily leaves a position she is capable of performing is not entitled to worker's compensation benefits.

In January 1987 the township board appointed plaintiff to the elected position of treasurer to fill a vacancy. The appointment expired in November 1988. Plaintiff chose not to run for treasurer in the August 1988 primary but instead sought another elective office. She lost the primary election for the new office. Plaintiff allegedly injured her back at work on September 16, 1988. However, she did not seek medical attention for her injury until some time in October 1988 and continued working until her appointment expired on November 20, 1988. Plaintiff did not officially notify the township board of her injury until December 12, 1988. She underwent corrective back surgery in February 1989. During the proceedings, plaintiff admitted that after her surgery she occasionally performed bookkeeping and cashiering tasks at a store owned by her husband.

The original worker's compensation magistrate found that plaintiff was disabled and awarded her benefits. The WCAC agreed that there was some evidence of a limitation on plaintiff's wage earning capacity but noted plaintiff's post-injury employment activity both for defendant and for her husband and remanded the case to determine plaintiff's residual wage-earning capacity within her qualifications and training.

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* Circuit judge, sitting on the Court of Appeals by assignment.

On remand, another magistrate found that plaintiff could only work if she could sit, stand, or lie down when necessary and therefore retained no residual wage earning capacity. The WCAC found that the second magistrate had exceeded his authority because the first magistrate and the WCAC had already determined that plaintiff had residual wage earning capacity. Moreover, plaintiff's own physician had testified that plaintiff was able to do "plenty of jobs," including "work in a doctor's or lawyer's office as long as everybody was tolerant of the fact that she had a back problem, and occasionally has to go take a little rest." Both plaintiff's physician and defendant's expert medical witness testified that after her surgery plaintiff was physically able to resume her former work as township treasurer. The WCAC found that plaintiff had not met her burden of proving the lasting effect of her injury and that one month was a reasonable period of post operative recovery. The commission vacated the second magistrate's decision and modified the original magistrate's decision to grant plaintiff benefits only from September 16, 1988 (the date of her injury) through March 7, 1989 (one month after her surgery).

In lieu of granting leave to appeal, this Court vacated the WCAC's order and remanded for reconsideration in light of *Sobotka v Chrysler Corp (After Remand)*, 447 Mich 1; 523 NW2d 454 (1994). This Court further directed that the WCAC could "remand the matter to a worker's compensation magistrate for the purpose of supplying a complete record if necessary. MCL 418.861a(12); MSA 17.237(861a)(12)."

In response, the WCAC noted that among the principles it had gleaned from *Sobotka*, *supra*, were:

> In order for a worker to be entitled to benefits, he or she must show that his or her wage loss is due to his or her injury.
>
> A partially disabled worker may be entitled to maximum benefits, if his or her unemployment is found to be directly or possibly solely attributable to the compensable injury.
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> * * * * *
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> It is the employee's burden to submit evidence to establish the necessary direct link between wage loss and the work-related injury, and the factfinder may infer from those proofs that the employee cannot find a job because of the injury. Under that limited factual scenario, the employee would be entitled to the maximum rate.
>
> However, the employer may then introduce other evidence to rebut that supposition and impeach the worker's claim, or stated otherwise, to "refute the inference that the partial disability solely caused the employee's total lack of earnings." This evidence would consist of those proofs relevant to the "monetary worth of the injured workman's services in the open labor market under normal employment conditions." The evidence that the employer presents must relate to real jobs in the real world that the employee

could acquire and perform and not to hypothetical jobs for which the employee's ability to perform is "nondescript."

* * * * *

[I]f the employer can produce relevant evidence that real jobs exist which plaintiff can perform, and the magistrate finds that plaintiff's lack of application, refusal, or other factors caused his or her continued unemployment (as opposed to the residual effects of his injury), then the magistrate may find that plaintiff retains a post-injury ability to earn within the meaning of Section 361(1).

Despite this analysis, the WCAC issued an opinion stating that defendant had failed to establish that real jobs with the restrictions required by plaintiff actually existed within a geographic locale within which plaintiff could reasonably be expected to work. The WCAC further declared itself bound by its ruling in its prior opinion that "plaintiff was entitled to an open award, subject to reduction by Section 361, or else we would close plaintiff's award." The commission concluded that "in light of the shift in the burden and type of proof required to establish post-injury ability to earn wages mandated in *Sobotka*, we now find that defendants have failed to establish the existence of the real jobs available in the real world which would entitle them to an offset under Section 361. Accordingly, plaintiff is entitled to the maximum award."

I agree with the dissenting commissioner that plaintiff did not show that her loss of wages was attributable to a compensable injury. Plaintiff voluntarily left her job with defendants and is therefore not entitled to benefits. As the dissenting commissioner notes:

I am deeply troubled by my colleagues' decision to award benefits in this case. I respectfully suggest that a person such as the plaintiff in this case, who voluntarily walked away from a job she was capable of performing, should not be awarded weekly compensation benefits on the basis of that job.

A basic tenet of worker's compensation law has always been that an employee who walks away from a job he or she is capable of performing is not entitled to benefits. See *Bower v Whitehall Leather Co*, 412 Mich 172[; 312 NW2d 640] (1981). This logical and rational principle has been codified via §301(5)(a) of the act.

In this case, plaintiff Pancone chose to walk away from her job. She voluntarily chose not to seek re-election to the position she held. She gave up her job in order to seek a different position – a gamble she unfortunately lost. Should such an individual, having voluntarily walked away from a job in order to pursue other employment options, be able to turn around and collect benefits from the employer providing the job she walked away from? I suggest that any such result produces a grave injustice not contemplated by the law. The record in this case indicates that plaintiff is able to perform the job she voluntarily left. Certainly, at least for the term of the position she chose to walk away from, she should not be entitled to benefits.

> Furthermore, the record indicates that plaintiff performed actual post-injury work after leaving her employment with defendant. Her own doctor, whose testimony the magistrate preferred, indicated an extensive residual ability to perform a broad range of clerical work widely available throughout the marketplace. The magistrate found plaintiff only partially disabled, and the Commission in its previous decisions wisely indicated that a precise determination of ability to earn was warranted under §361(1). The Supreme Court decision in *Sobotka v Chrysler Corp*, 447 Mich 1 (1994) should not change this result. The notion that a minimally-restricted plaintiff such as Ms. Pancone, with her extensive ability to perform readily-available work, should be given an open award against an employer whose work she can perform, but chose not to, constitutes a severe miscarriage of justice for the defendants in this case.

Errors of law by the WCAC are not immune to appellate review. MCL 418.861a(14); MSA 17.237(861a)(14); *Goff v Bil-Mar Foods*, 454 Mich 507, 512; ___ NW2d ___ (1997); *Barr v Stroh Brewery Co*, 189 Mich App 549, 551-552; 473 NW2d 716 (1991). The WCAC found that because plaintiff did not seek reelection to her position that her situation was more similar to a temporary contract position with a definite termination date than a situation involving a voluntary abandonment of a job or malingering, and that plaintiff's post-injury earnings could not thus be used to offset her award under Section 361. The commission majority admitted that they found this result in the present case "troubling." I agree that the result is troubling and believe that the commission made an error of law that is not immune to review by this Court.

Moreover, as defendants now argue to this Court, they should have been given the opportunity to produce the proofs *Sobotka* now requires of defendants/employers to rebut the inference that plaintiff's partial disability solely caused her lack of earnings. Were it not for the voluntary nature of plaintiff's leaving her position, I would remand to the WCAC for further factfinding on this issue pursuant to MCL 418.861a(12); MSA 17.237(861a)(12). As defendants correctly argue, they could not have anticipated the need to offer defense proofs regarding the availability of jobs plaintiff was capable of performing because *Sobotka, supra* had not been decided at the time of the original proceedings.

I would reverse the grant of an open award to this plaintiff.

/s/ Hilda R. Gage